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IN THE

Supreme Court of the United States

MARILYN SHIRLEY AND RAYMOND DOUGLAS SHIRLEY,
Petitioners,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In 1974, Congress amended the Federal Tort Claims Act, 28 U.S.C. § 2860(h) ("FTCA"), to provide expressly that the United States could be held liable for the intentional torts of its law enforcement officers. The question presented by this case is whether the FTCA is properly construed to incorporate state rules of respondeat superior that would effectively foreclose the liability mandated by Congress.

PARTIES TO THE PROCEEDING

Petitioners are the plaintiffs-appellants below. Defendant-appellee below, the United States, is respondent under this Court's Rule 12.6.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 1

STATEMENT OF THE CASE 3

A. Statutory Background 4

B. Factual Background 6

C. Proceedings Below 9

REASONS FOR GRANTING THE PETITION 12

I. The Court Should Grant the Petition To Eliminate Confusion Over the Proper Relationship Between State Law and the Waiver of Sovereign Immunity in the FTCA 13

II. The Court Should Grant the Petition To Resolve a Growing Divide Over the Correct Understanding of the Scope of Employment of Law Enforcement Officials 22

CONCLUSION 28

APPENDIX A:
Opinion,
United States Court of Appeals for
the Fifth Circuit, May 17, 2007 ..... 1a

TABLE OF CONTENTS
(continued)

Page

APPENDIX B:
Order on Petition for Rehearing and Rehearing En Banc,
United States Court of Appeals for the Fifth Circuit, July 16, 2007 ..... 6a

APPENDIX C:
Order Granting Motion for Summary Judgment and Denying Motion for Partial Summary Judgment,
U.S. District Court for the Northern District of Texas, March 21, 2006 ..... 8a

APPENDIX D:
Final Judgment,
U.S. District Court for the Northern District of Texas, March 21, 2006 ..... 16a

APPENDIX E:
Order Denying Motion for Reconsideration,
U.S. District Court for the Northern District of Texas, May 9, 2006 ..... 18a

APPENDIX F:
Provisions of the Federal Tort Claims Act,
codified at 28 U.S.C. §§ 1346 *et seq.* 20a

TABLE OF AUTHORITIES
(continued)

Page

CASES

Baker v. Texas & P. Ry. Co.,
359 U.S. 227 (1959) 26

Barnhart v. Thomas, 540 U.S. 20
(2003) 14

Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics,
403 U.S. 388 (1971) 9, 26

Burks v. Lasker,
441 U.S. 471 (1979) 19

Burlington Indus., Inc. v. Ellerth,
524 U.S. 742 (1998) 26

Carlson v. Green,
446 U.S. 14 (1980) 6, 25

Chapa v. DOJ,
339 F.3d 388(5th Cir. 2003) 6

City of Sharonville v. American Employers Ins.,
846 N.E.2d 833 (Ohio 2006) 24

Doe v. City of Chicago,
360 F.3d 667 (7th Cir. 2004) 21, 22, 23, 24

Doe v. Forrest,
853 A.2d 48, 61 (Vt. 2004) 23

Doe v. White,
No. 00 C 0928, 2003 WL 256889
(N.D. Ill. 2003) 24

Dolan v. U.S. Postal Service,
546 U.S. 481 (2006) 14

Feres v. United States,
340 U.S. 135, 139 (1950) 20

TABLE OF AUTHORITIES
(continued)

Page

Field v. United States,
107 F. Supp. 401 (N.D. Ill. 1952) 15

Frazier v. Badger,
603 S.E.2d 587 (S.C. 2004) 24

Garcia v. United States,
799 F. Supp. 674 (W.D. Tex. 1992) 13, 14, 15

Indian Towing Co. v. United States,
350 U.S. 61 (1955) 4, 12, 16, 18

Latullas v. State, 658 So. 2d 800
(La. Ct. App. 1995) 23

Lopez v. Gonzales,
127 S. Ct. 625 (2006) 19

Mackey v. U.P. Enters., Inc.,
935 S.W.2d 446 (Tex. App. 1996) 11, 21

Mary M. v. City of Los Angeles,
814 P.2d 1341 (Cal. 1991) 23

Medrano v. City of Pearsall,
989 S.W.2d 141 (Tex. App. 1999) 21

Molzof v. United States,
502 U.S. 301 (1992) 25

NLRB v. Hearst Publications,
322 U.S. 111 (1944) 25

Norris ex rel. West v. Waymire,
114 F.3d 646 (7th Cir. 1997) 23

Parker v. Midwest City,
850 P.2d 1065 (Okla. 1993) 17

Primeaux v. United States,
191 F.3d 874 (8th Cir. 1999) 16, 19

Red Elk ex rel. Red Elk v. United States,
62 F.3d 1102 (8th Cir. 1995) 23

TABLE OF AUTHORITIES
(continued)

Page

Shantelle S. v. State,
No. 110268, 2006 WL 1141199 (N.Y. Ct. Cl. 2006) 24

United States v. Campbell,
172 F.2d 500 (5th Cir. 1949) 15

United States v. Gaubert,
499 U.S. 315 (1991) 10

United States v. Miller,
132 Fed. Appx. 10 (5th Cir. 2005) 9

United States v. Muniz,
374 U.S. 150 (1963) 12, 16, 18

United States v. Olson,
546 U.S. 43 (2005) 16, 21

United States v. Sharpe,
189 F.2d 239 (4th Cir. 1951) 15

United States v. White Mountain Apache Tribe,
537 U.S. 465 (2003) 18

Williams v. United States,
350 U.S. 857 (1955) 15, 16, 17

STATUTES

18 U.S.C. § 2241(a)(1) 9

18 U.S.C. § 2243 3

18 U.S.C. § 2243(b) 9

18 U.S.C. § 2243(b)(2) 3

18 U.S.C. § 2244(a)(1) 9

18 U.S.C. § 2244(a)(4) 9

18 U.S.C. § 3050 6

TABLE OF AUTHORITIES
(continued)

Page

18 U.S.C. § 3624(b) 8
18 U.S.C. § 4042 10
21 U.S.C. § 843(b) 7
28 U.S.C. § 1346(b) ..... *passim*
28 U.S.C. § 2680(a) 5, 10
28 U.S.C. § 2674 25
28 U.S.C. § 2675(a) 14
28 U.S.C. § 2675(b)(1) 14
28 U.S.C. § 2680(h) ..... *passim*
Act of Mar. 16, 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50 (1974) 6
Prison Rape Elimination Act of 2003, Pub. L. 108-79, 117 Stat. 974 (2003) 7
Restatement (Second) of Agency § 228(1)(c) (1958) 18
Tex. Civ. Prac. & Rem. Code Ann. § 101.057(2) 21

REGULATION

28 C.F.R. § 541.13 8

OTHER AUTHORITIES

Allen J. Beck, et al., *Bureau of Justice Statistics Special Report: Sexual Violence Reported by Correctional Authorities, 2006* (Aug. 2007) 6

TABLE OF AUTHORITIES
(continued)

Page

Dianne Rosky, *Respondeat Inferior: Determining the United States' Liability for the Intentional Torts of Federal Law Enforcement Officials*, 36 U.C. Davis L. Rev. 895, 933-935 (2003) 14, 20, 21, 26

General Accounting Office, Report to the Hon. Eleanor Holmes Norton, House of Representatives, *Women in Prison: Sexual Misconduct by Correctional Staff* (June 1999) 6, 7

Jack Boger, et al., *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretive Analysis*, 54 N.C. L. Rev. 497 (1976) 18, 26

Office of the Inspector General, *Deterring Staff Sexual Abuse of Federal Inmates* (Apr. 2005) 6

Rochelle Rubin Weber, *Note, "Scope of Employment" Redefined: Holding Employers Vicariously Liable for Sexual Assaults Committed by Their Employees*, 76 Minn. L. Rev. 1513 (1992) 22

S. Rep. No. 93-588 (1974) 5, 16

William Lloyd Prosser, et al., *Prosser & Keeton on Torts* (5th ed. 1984) 17

PETITION FOR A WRIT OF CERTIORARI

Petitioners Marilyn Shirley and Raymond Douglas Shirley respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals is unreported but is available at 2007 WL 1454739 and is reprinted in the Appendix to the Petition ("App.") at 1a-5a. The order of the district court is unreported but is available at 2006 WL 708651 and is reprinted at App. 8a-15a.

JURISDICTION

The court of appeals entered its judgment on May 17, 2007. App. 1a-5a. A petition for rehearing was denied on July 16, 2007. *Id.* at 18a-19a. This petition is timely filed within 90 days thereafter. 28 U.S.C. § 2101(c). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Title 28 of the United States Code provides in relevant part:

§ 1346. United States as defendant

> **(b)(1)** Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing

on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

§ 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

. . . . .

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided,* That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso [enacted March 16, 1974], out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches,

to seize evidence, or to make arrests for violations of Federal law.

28 U.S.C. §§ 1346(b)(1), 2680(h).

STATEMENT OF THE CASE

This case arises from the rape of petitioner Marilyn Shirley, then an inmate at the Federal Medical Center for Women in Carswell, Texas, by a United States Correctional Officer, Michael Miller. There is no dispute that on March 11, 2000, Officer Miller, the sole officer on duty to monitor female inmates in the "Camp" where Shirley was housed, awakened Shirley and ordered her to report to the Officers' Station, where he sexually assaulted her and then warned her against reporting the rape.

Three months after Miller was indicted for the sexual abuse of a ward in violation of 18 U.S.C. § 2243, petitioners brought suit against the United States under a provision of the Federal Tort Claims Act ("FTCA") that waives the government's sovereign immunity from suit for "any claim arising . . . out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution" with "regard to acts or omissions of investigative or law enforcement officers of the United States Government." 28 U.S.C. § 2680(h). Despite this waiver of immunity, the district court dismissed petitioner's suit on the ground that the officer who had raped her while she was "under [his] custodial, supervisory, [and] disciplinary authority," 18 U.S.C. § 2243(b)(2), was nevertheless not acting within the "scope of his employment," as required by the FTCA, under the common law of the State of Texas. App. 15a. The court of appeals affirmed this result, again incorpo-

rating Texas state law into the FTCA, and reasoning that the officer's act was not closely related to, and did not grow out of, a legitimate employment duty or goal, as it believed state law to require. *Id.* at 1a-5a.

A. Statutory Background

1. The Federal Tort Claims Act ("FTCA" or "the Act") was enacted in 1946 to waive the federal government's sovereign immunity from suit for employees' torts under specified circumstances. 28 U.S.C. § 1346(b)(1); *see Indian Towing Co. v. United States*, 350 U.S. 61, 68-69 (1955). The FTCA creates exclusive federal jurisdiction over claims against the United States:

> for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(1). The statute thus requires a plaintiff who seeks to recover from the government to demonstrate (1) that his alleged tortfeasor was a federal employee, (2) that the employee acted in the scope of his employment, and (3) that the actions giving rise to the claim constituted a tort under local law.

Congress also provided certain exceptions to this broad waiver of immunity. Specifically, and as relevant here, Congress immunized the government from suit for claims "based upon the exercise or per-

formance [of] . . . a discretionary function or duty." 28 U.S.C. § 2680(a). In its original form, the FTCA also excepted most intentional torts from its waiver of immunity. 28 U.S.C. § 2680(h) (excluding claims arising out of "assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights").

2. In 1974, prompted by a notorious episode in which federal agents in Collinsville, Illinois, conducted a series of "abusive, illegal, and unconstitutional 'no-knock' raids," S. Rep. No. 93-588, at 2 (1974), Congress reconsidered the intentional tort exception in 28 U.S.C. § 2680(h). To provide a remedy for such illegal or unauthorized conduct on the part of federal law enforcement officers, Congress tailored an amendment to the FTCA to ensure that the federal government would be made "liable for the tortious acts of its law enforcement officers," even "when they act in bad faith or without legal justification," so long as the acts are taken within the scope of employment or "under color of Federal law." S. Rep. No. 93-588, at 4 (1974). Congress accordingly provided

> That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution.

Act of Mar. 16, 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50 (codified as amended at 28 U.S.C. § 2680(h) (1974)) ("the 1974 amendment").[1] Because Congress made the intentional torts of law enforcement officers actionable through § 1346(b), the general place and scope of employment restrictions of that provision apply to intentional tort claims, as well.

B. Factual Background

1. The sexual abuse of inmates by prison guards and staff is a serious and all too frequent problem in the federal prison system. In 2006 alone, 242 federal inmates alleged that they had been the victims of sexual violence while incarcerated. *See* Allen J. Beck, et al., *Bureau of Justice Statistics Special Report: Sexual Violence Reported by Correctional Authorities, 2006* at 3, table 1 (Aug. 2007), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/svrca06.pdf. Between fiscal years 2000 and 2004, the Department of Justice's Office of the Inspector General opened 351 investigations of staff members alleged to have sexually abused inmates. Office of the Inspector General, *Deterring Staff Sexual Abuse of Federal Inmates* 6 (Apr. 2005). And "[m]any correctional experts believe that staff-on-inmate sexual misconduct is likely underreported . . . due to the fear of retaliation and vulnerability felt by female inmates." Gen-

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[1] The amendment defines a "law enforcement officer[]" as a federal official "who is authorized by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." A correctional officer in the Bureau of Prisons falls squarely within that definition. *See* 18 U.S.C. § 3050 (powers of Bureau officers); *Chapa v. DOJ*, 339 F.3d 388, 390 (5th Cir. 2003) ("[A]s defined in § 2680(h), a BOP official is a federal law enforcement officer.") (citing *Carlson v. Green*, 446 U.S. 14, 17 (1980)).

eral Accounting Office, Report to the Hon. Eleanor Holmes Norton, House of Representatives, *Women in Prison: Sexual Misconduct by Correctional Staff* 7 (June 1999). It is the national policy of this country to eliminate the sexual abuse of prisoners. *See* Prison Rape Elimination Act of 2003, Pub. L. 108-79, 117 Stat. 974 (2003) (establishing "zero-tolerance standard" for sexual abuse of prisoners).

2. On January 12, 1998, petitioner Marilyn Shirley ("petitioner" or "Shirley") entered the Federal Medical Center at Carswell, Texas, to begin serving a 37-month sentence for the unlawful use of a communication device to facilitate the distribution of a controlled substance, in violation of 21 U.S.C. § 843(b). App. 8a-9a. A first-time offender who had cooperated with the government and had been placed in the Witness Protection Program, Shirley was assigned to the "Camp," a minimum-security residential unit located outside the secure perimeter of the medical facility. The Camp houses approximately 240 female inmates and has a relatively low staff-to-inmate ratio. *See* R. 231.[2]

One of the guards assigned to the Camp was Correctional Officer Michael Lawrence Miller. R. 289. On March 11, 2000, Officer Miller was the only officer assigned to monitor the inmates in the Camp during the early morning shift. Shortly after 3:00 that morning, Officer Miller awakened petitioner, ordered her out of her cell, and directed her to report to the Officer's Station. *Id.* at 260. Had she disobeyed the order, Shirley would have been subject to

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[2] Citations are to the appellant's record, filed with the court of appeals, and take the form R. [page].

official discipline, *see* 28 C.F.R. § 541.13 (Code 307), including the loss of "good conduct time," which would have delayed her release from imprisonment, *see* 18 U.S.C. § 3624(b).

When petitioner arrived at the Station, Officer Miller locked the door, ordered her to sit down, and used his radio to arrange for a guard at the main prison facility to signal if any other officer approached the Station. R. 260, 289. Officer Miller then began to kiss petitioner and pulled her into an adjacent supply room. As she wrestled to get away from him, Officer Miller raped petitioner Shirley. *Id.* at 260. While he was raping her, Officer Miller repeatedly told Shirley that, if she ever reported the assault, no one would believe her word over his. *Id.* Eventually, Officer Miller heard someone on the radio clear his throat, and he completed his sexual assault by ejaculating on Shirley and on her clothing. *Id.*

Upon returning to her cell, Shirley placed the clothes she was wearing in plastic wrap and hid them under her locker. R. 227, 259, 289. She provided that evidence to Camp officials when she reported the rape to a Correctional Officer and the Camp Administrator on September 8, 2000, immediately before she was released from the facility. *Id.* at 233, 259, 289.[3]

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[3] Had Shirley reported the rape as an inmate, she would have risked a transfer to "protective custody" or "administrative custody for investigation," either of which would have involved maximum-security, solitary living conditions. *See* R. 314-315.

3. On August 13, 2003, a grand jury indicted Officer Miller for, *inter alia*, aggravated sexual abuse, in violation of 18 U.S.C. § 2241(a)(1); two counts of abusive sexual contact, in violation of 18 U.S.C. § 2244(a)(1), (4); and sexual abuse of a ward, in violation of 18 U.S.C. § 2243(b). R. 238. A jury found Officer Miller guilty on all counts, and on July 2, 2004, he was sentenced to 150 months of imprisonment. *Id.* at 234, 258-59. *See United States v. Miller*, 132 Fed. Appx. 10 (5th Cir. 2005), *cert. denied*, 546 U.S. 939 (Oct. 11, 2005).[4]

C. Proceedings Below

1. On November 26, 2003, after exhausting their administrative remedies, petitioners filed a complaint against the United States pursuant to the Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1). Petitioners raised two distinct claims. First, they argued that the government was directly liable for its negligence in hiring, training, supervising, and retaining Officer Miller. Second, petitioners argued that the United States was vicariously liable for Officer Miller's intentional infliction of emotional distress, battery, assault, false imprisonment, negligence per se, and negligence. App. 10a. Petitioners moved for summary judgment on their claims of vicarious liability, and the government moved for

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[4] Petitioners subsequently filed a *Bivens* action against Officer Miller in the United States District Court for the Northern District of Texas. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). Although the jury returned a verdict in favor of petitioners in the amount of $4 million, Officer Miller, who is serving his 150-month sentence, has no attachable assets and is virtually judgment-proof. Pet. C.A. Br. 3 n.1.

summary judgment on all of petitioners' claims. *Id.* On March 21, 2006, the district court granted summary judgment for the government. *Id.*

a. The district court rejected petitioners' argument that the government was directly liable for negligence in hiring and training Officer Miller, explaining that "employment decisions, [such as] the manner in which the United States selects, trains, and supervises its employees, are discretionary functions." App. 13a; *see* 28 U.S.C. § 2680(a); *United States v. Gaubert*, 499 U.S. 315 (1991). The court recognized that "regulations and statutes . . . provide that the Bureau of Prisons has a duty to provide a safe environment and protect its inmates," *see* 18 U.S.C. § 4042, but reasoned that those "statutes and regulations d[id] not limit . . . the existence of discretion for implementing that specific policy." App. 13a-14a. The court therefore concluded that petitioners' claims of negligence in hiring and training fell within the discretionary function exception of 28 U.S.C. § 2680(a). *Id.*

b. Next, the district court held that the government was not vicariously liable for Officer Miller's assault because the assault was not within the scope of his employment. The district court looked to Texas state law to determine scope of employment, as it believed it was required to do under 28 U.S.C. § 1346(b)(1). App. 14a. Unable to cite any cases from Texas that involved comparable circumstances of rape or assault by a law enforcement officer, the district court relied upon a decision that considered sexual harassment, in the context of a worker's compensation statute, to determine the scope of Officer Miller's employment at the federal penitentiary. *See*

id. (citing *Mackey v. U.P. Enters., Inc.*, 935 S.W.2d 446, 453 (Tex. App. 1996)). Ultimately, the court concluded that an employee acts within the scope of employment under Texas law, and thus under the FTCA, only if "his actions are (1) within the general authority given him, (2) in furtherance of the employer's business, and (3) for the accomplishment of the object for which he was employed." *Id.* (citing state cases). Because the court believed that Miller had "stepped aside from his employment to accomplish his own, rather than [his employers'] purpose" when he assaulted Shirley, the court concluded that he had not acted within the scope of employment and that the United States was not vicariously liable for his acts. *Id.*

2. The court of appeals affirmed. Critically, like the district court, the court of appeals construed the FTCA's "scope of employment" requirement to incorporate state-law principles of respondeat superior. The court of appeals went on to reject petitioners' argument that, although the district court had correctly stated the general test for scope of employment in Texas, it had erred in applying that law in the very different context of assault in a penal institution. *See* App. 4a. Although petitioners cited several cases in which employers had been found liable for employees' intentional torts, the court of appeals held that petitioners' claim could not succeed because they had failed to "show[] that [Miller's] wrongful act grew out of a legitimate employment duty or goal" or that the assault was "closely related" to such a duty or goal, as the court of appeals believed Texas law to require. *Id.*

3. Petitioners filed a petition for rehearing and rehearing en banc. Petitioners emphasized that their claims fell within the law enforcement exception to the intentional tort bar of 28 U.S.C. § 2680(h). They noted that incorporation of state law as articulated by the district court and court of appeals would negate the exception in § 2680(h), because the listed torts would never fall within an officer's "scope of employment," as narrowly defined below. The court of appeals denied the petition on July 16, 2007.

REASONS FOR GRANTING THE PETITION

The court of appeals in this case purported to apply Texas state law to determine whether the federal government could be held liable for the intentional tort of a federal corrections officer who assaulted an inmate while on duty. That approach is incorrect; it effectively reads out of the FTCA Congress' waiver of immunity for the intentional torts of law enforcement officers, and it conflicts with the decisions of this Court in *Indian Towing Co. v. United States*, 350 U.S. 61 (1955), and *United States v. Muniz*, 374 U.S. 150 (1963). The court of appeals' decision also (1) exacerbates the confusion among federal courts over the proper relationship between federal and state law under the FTCA, and (2) aggravates the growing divide among numerous federal and state courts regarding the scope of employment of law enforcement officers. Contrary to the plain text and congressional intent behind the FTCA, the decision below prevents federal inmates, who, unlike other plaintiffs, are subject to the government's complete control, from recovering from the government when its employees use that control intentionally to engage in harmful acts. Petitioners therefore respect-

fully request that this Court grant the petition for a writ of certiorari and reverse the decision of the court of appeals.

I. The Court Should Grant the Petition To Eliminate Confusion Over the Proper Relationship Between State Law and the Waiver of Sovereign Immunity in the FTCA.

A. Since the FTCA was enacted, federal courts have split over, and been confused by, the proper relationship between state law and the federal waiver of immunity in 28 U.S.C. § 1346(b)(1). Although the statute clearly ties federal liability to the "law of the place" where a tort occurred, there is persistent uncertainty as to whether the "law of the place" governs not only the types of torts for which a plaintiff can recover but also whether a certain act was within a tortfeasor's "scope of employment."

1. The FTCA waives immunity with respect to the wrongful acts of

> any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where [the act] occurred.

28 U.S.C. § 1346(b)(1). Application of the usual canons of construction strongly suggests that "law of the place" should be read as pertaining only to the "circumstances where . . . a private person[] would be liable"—in other words, to govern the type of torts for which a plaintiff may sue, but not the determination of "scope of employment." *See Garcia v. United States*, 799 F. Supp. 674, 676-681 (W.D. Tex. 1992),

rev'd in relevant part, 62 F.3d 126 (5th Cir. 1995) (en banc) (per curiam); Dianne Rosky, *Respondeat Inferior: Determining the United States' Liability for the Intentional Torts of Federal Law Enforcement Officials*, 36 U.C. Davis L. Rev. 895, 933-935 (2003).[5] That reading of the intentional tort exclusion in § 2680(h) is also consistent with this Court's practice of construing exceptions to the FTCA narrowly, against the government. *See Dolan v. U.S. Postal Service*, 546 U.S. 481, 491-492 (2006).

Unsurprisingly, therefore, in the years after the FTCA was adopted, several federal courts held that § 1346(b)(1) required application of "federal law and decisions to determine whether . . . the person who inflicted the injury was an 'employee of the Government acting within the scope of his office or employ-

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[5] Under the "'rule of the last antecedent,' according to which a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows," *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003), the phrase "law of the place" modifies the phrase "under circumstances where the United States, if a private person, would be liable." Reading the determination of "scope of employment" as implicitly included in the "circumstances where . . . a private person[] would be liable" renders superfluous the specific reference to scope in the Act. *See Garcia v. United States*, 799 F. Supp. 674, 678 (W.D. Tex. 1992) ("By expressly including the scope of employment language in this provision, Congress has indicated that this element should be determined separately and distinctly from the law of the place."), *rev'd in relevant part*, 62 F.3d 126 (5th Cir. 1995) (en banc) (per curiam). Other provisions of the FTCA, which refer to an employee "acting within the scope of his office or employment" without referring to the "law of the place" under which this might be determined, confirm that "scope of employment" is a federal question, not one to be addressed under state law. *See id.* at 679 (citing 28 U.S.C. §§ 2675(a), 2679(b)(1)).

ment,'" and "local law for the purpose of determining whether the act with which he is charged gives rise to liability." *United States v. Sharpe*, 189 F.2d 239, 241 (4th Cir. 1951); *accord Field v. United States*, 107 F. Supp. 401, 404 (N.D. Ill. 1952). The Fifth Circuit, however, split from this consensus in *United States v. Campbell*, 172 F.2d 500, 503 (5th Cir. 1949), where it held that state law governed the scope of military employment.

This Court weighed in on the issue in *Williams v. United States*, 350 U.S. 857 (1955) (per curiam), where it reversed a Ninth Circuit decision that had held that scope of employment in the military context is a question of federal law. In its entirety, this Court's opinion stated:

> This case is controlled by the California doctrine of respondeat superior. The judgment is vacated and the case is remanded for consideration in the light of that governing principle.

Williams, 350 U.S. at 857. That ruling was rendered against the position of the Solicitor General that a uniform federal standard was both necessary and consistent with the statute. Br. for the United States, No. 24, Oct. Term 1955, at 35-36.

Although the federal courts generally, but not uniformly, *see Garcia*, 799 F. Supp. at 676-677 & n.7, understood *Williams* to resolve the conflict between the Fifth and the Fourth and Ninth Circuits, the lack of reasoning in the decision has left the courts confused over the proper relationship between state and federal law in the FTCA. For example, courts have remained unsure to what extent a state's tort law and immunities may limit a plaintiff's ability to

recover under the federal statute. *See, e.g.*, *United States v. Olson*, 546 U.S. 43, 44-45 (2005) (abrogating cases holding that the federal government could be liable under the FTCA where local law would make a state or municipal entity liable); *United States v. Muniz*, 374 U.S. 150, 164 (1963) (rejecting argument that state rules of immunity applied to shield government from liability); *see also Indian Towing Co. v. United States*, 350 U.S. 61, 65 (1955) (rejecting application of the "'non-governmental'—'governmental' quagmire . . . plagu[ing]" state law).

2. That confusion has only intensified since Congress adopted the 1974 amendment to the FTCA, which raises serious questions as to the proper application of state and federal law under 28 U.S.C. § 2680(h). There is no dispute that Congress, in adopting the 1974 amendment, intended to waive the government's immunity for those torts committed by law enforcement officers not only within the scope of employment but also "under color of Federal law," regardless of whether they were committed "in bad faith or without legal justification." S. Rep. No. 93-588, at 3, 4 (1974); *see United States v. Muniz*, 374 U.S. 150 (1963) (explaining that to determine whether federal prisoners were "entitled to maintain the[ir] suits require[s] [the Court] to determine what Congress intended when it passed the [FTCA] in 1946"). The courts of appeals, however, have struggled to effectuate that intent. *See Primeaux v. United States*, 191 F.3d 874, 882 (8th Cir. 1999) (en banc) (Lay, J., dissenting). The decision below negates that intent completely. This case thus provides the Court with an opportunity to revisit *Williams* and clarify the proper relationship between

state and federal law under 28 U.S.C. § 1346(b)(1) and 28 U.S.C. § 2680(h).[6]

a. As the court of appeals' decision in this case demonstrates, the application of state law to determine the scope of employment of law enforcement officers under 28 U.S.C. § 2680(h) may exclude from coverage the very transgressions for which Congress intended to waive immunity. Indeed, torts committed "in bad faith or without legal justification"—the precise object of the 1974 amendment—are the most likely, by definition, to fall *outside* of state doctrines of respondeat superior. *See Parker v. Midwest City*, 850 P.2d 1065, 1068 (Okla. 1993) ("If Officer Strong's actions were in bad faith he was acting outside his scope of employment, and thus the City is not liable."); *compare* William Lloyd Prosser, et al., *Prosser & Keeton on Torts* 882-83 (5th ed. 1984) (explaining that plaintiff suing for malicious prosecution, *see* 28 U.S.C. § 2680(h), must establish "malice," which is present where employee's purpose is "something other than the social one of bringing an offender to justice," which is the only proper justifi-

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[6] *Williams* was an ordinary negligence case arising under 28 U.S.C. § 1346(b)(1), and did not implicate § 2680(h)'s subsequent and express assumption of liability for the intentional torts of law enforcement officers. Accordingly, this Court need not overrule *Williams* in order to adopt petitioners' view that, at a minimum, state common law should not be understood to define the "scope of employment" of law enforcement officers charged with intentional torts. To the extent that this Court believes *Williams* has any bearing on the interpretation of § 2680(h), however, this case presents an ideal opportunity to revisit that decision, particularly in light of more recent Court precedent reading federal employment statutes to implement uniform national standards of respondeat superior. *See infra* page 26 n.8.

cation for a criminal proceeding); *with* Restatement (Second) of Agency § 228(1)(c) (1958) (providing that action is not within scope of employment if it is not motivated by purpose to serve the master).

Thus, construing "scope of employment" under the FTCA to incorporate state-law respondeat superior doctrines often will have the effect—as it did here—of reading the 1974 amendment right out of the Act. This Court has repeatedly cautioned against any form of statutory interpretation that leads to such a result, regardless of the statute at issue. *See, e.g., United States v. White Mountain Apache Tribe*, 537 U.S. 465, 477 (2003) (explaining that "the more fundamental objection to the Government's position is that, if carried to its conclusion, it would read the trust relation out of Indian Tucker Act analysis; if a specific provision for damages is needed, a trust obligation and trust law are not"). And it has been particularly cautious with respect to the FTCA, emphasizing that the Act is not "self-defeating by covertly embedding the casuistries of [local] liability for torts." *Indian Towing Co. v. United States*, 350 U.S. 61, 65 (1955). Congress "having decided that discipline in the federal prisons will not be so seriously impaired that all recovery should be denied for [intentionally] inflicted injuries," the court of appeals in this case erred under this Court's precedent by concluding that the legislature did, "at the same time[,] make recovery depend upon a State's decision to the contrary." *United States v. Muniz*, 374 U.S. 150, 165 (1963); *see also* Jack Boger, et al., *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretive Analysis*, 54 N.C. L. Rev. 497, 522-23 (1976) ("[S]ince the

amendment by its terms applies to federal 'officers,' . . . the question of scope of employment in litigation under the [1974] amendment should be answered independently of prior interpretations under the general provisions of the FTCA.").

Indeed, this Court has repeatedly held that, even where a federal statute clearly incorporates state law for the rule of decision, the state law applies only to the extent that it is consistent with the federal policy underlying the cause of action and does not cause "the prohibition of [the] federal statute . . . [to] be set at naught." *Burks v. Lasker*, 441 U.S. 471, 479 n.6 (1979) (internal quotation marks omitted); *cf. Lopez v. Gonzales*, 127 S. Ct. 625, 632 (2006) (refusing, under immigration statute that defined "aggravated felony" to include "any felony punishable under the Controlled Substances Act [CSA]," including "offense[s] . . . in violation of Federal or State law," to include as aggravated felony a state drug felony punishable under the CSA because, *inter alia*, Congress had already "pegged the immigration statutes to the classifications Congress itself chose"). In this case, of course, it is far from clear that state law is intended to play any role at all in determination of "scope of employment" under the FTCA. *See supra* pages 5-6, 113-15 & n.5. It is thus particularly unjustifiable to deploy state law in a way that so radically undermines the purpose of the 1974 amendment.

b. The court of appeals' decision in this case exacerbates the existing confusion over the proper interplay between 28 U.S.C. §§ 1346(b)(1) and 2680(h). In *Primeaux v. United States*, 191 F.3d 874 (8th Cir. 1999) (en banc), the Eighth Circuit divided six-five

over the question whether a tribal police officer was acting within the scope of his employment when he approached a stranded motorist in his police car with his red lights flashing, drove her to an isolated spot, ordered her out of the car, and raped her, all while he was on a government-paid trip to the state of New Mexico. *See id.* at 882 (Lay, J., dissenting). The majority, applying state law, concluded he was not. *Id.* at 881 (majority opinion). The dissent objected that the court's "strict, literal interpretation of scope of employment" excluded from the waiver of immunity "th[o]se acts" for which "Congress intended . . . liability" in adopting the 1974 amendment. *Id.* at 885 (Lay, J., dissenting).

3. The confusion over the role of state law is particularly intolerable given that there is no "workable, consistent and equitable" body of state law to apply to determine the "scope of employment" of law enforcement officers. *Feres v. United States*, 340 U.S. 135, 139 (1950) (explaining that the FTCA should be construed "to make a workable, consistent and equitable whole" because "[t]he [Act] was not an isolated and spontaneous flash of congressional generosity. It marks the culmination of a long effort to mitigate unjust consequences of sovereign immunity from suit"). Several states have excluded the intentional torts of law enforcement officers from their waivers of sovereign immunity. As a result, the courts of those states have not developed law on the subject to which federal courts may turn in interpreting the FTCA. *See* Rosky, 36 U.C. Davis L. Rev. at 901-902 & n.17 (citing Georgia, Massachusetts, and Texas statutes).

Indeed, Texas itself excludes from its waiver of immunity all claims "arising out of assault, battery, false imprisonment, or any other intentional torts." Tex. Civ. Prac. & Rem. Code Ann. § 101.057(2); *see Medrano v. City of Pearsall*, 989 S.W.2d 141, 144 (Tex. App. 1999) (dismissing suit against city brought by plaintiff who was assaulted by police officer because statutory "waiver of immunity does not extend to . . . intentional torts"). As a result, there is no Texas common-law rule as to when an intentional tort by a government official may fall within the "scope of employment" of that official. The district court below was left to divine for itself what state courts might determine to be within the scope of employment of a correctional officer—a man who is "armed, has authority to arrest[,] . . . has access to all sorts of personal information, is an authority figure trained to develop and project an intimidating aura, and may seem to be above the law," *Doe v. City of Chicago*, 360 F.3d 667, 671 (7th Cir. 2004) (Posner, J.)—by considering a radically different case involving sexual harassment and a worker's compensation statute. *See* App. 14a (citing *Mackey v. U.P. Enters., Inc.*, 935 S.W.2d 446, 453 (Tex. App. 1996)).[7]

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[7] To be sure, as this Court explained in *United States v. Olson*, 546 U.S. 43, 46 (2005), courts are not limited to consulting state cases that arise out of "the same circumstances" of liability. They may look to cases involving "like circumstances" of liability, involving "[p]rivate individuals[] who . . . [have] a relationship with third parties that is similar to the relationship" between the government employee and individual bringing suit. *Id.* at 47. As explained *infra* pages 23-25, however, there are no private individuals who have a relationship to third parties similar to that of a federal law enforcement officer to federal inmates.

Even when state law is clear on the subject, there is no justification for incorporating into the FTCA state-law respondeat superior rules that are at cross-purposes with the statute itself. When there *is* no clear state law—as in the case below—construing the FTCA to require incorporation of state law becomes wholly unworkable, as well. Courts—like the courts below—are left with no tools other than inapt precedent, and no choice but to make their own judgments about which, if any, intentional torts of law enforcement officers fall within the "scope of employment." This Court should grant review to address this problem and the confusion it has generated, and to clarify the relationship between state and federal law in construing the "scope of employment" requirement of the FTCA.

II. The Court Should Grant the Petition To Resolve a Growing Divide Over the Correct Understanding of the Scope of Employment of Law Enforcement Officials.

1. The court of appeals' decision in this case exacerbates a growing divide among the state and federal courts with respect to the correct understanding of the scope of employment of law enforcement officers. *See Doe v. City of Chicago*, 360 F.3d 667, 671 (7th Cir. 2004) (Posner, J.) (collecting cases); Rochelle Rubin Weber, *Note, "Scope of Employment" Redefined: Holding Employers Vicariously Liable for Sexual Assaults Committed by Their Employees*, 76 Minn. L. Rev. 1513, 1523-1530 & n.32-65 (1992) (describing different approaches and collecting cases).

a. A number of states have recognized that sexual assault by law enforcement officers generally,

and prison officials in particular, falls within the scope of those officers' employment. *See, e.g., Red Elk ex rel. Red Elk v. United States*, 62 F.3d 1102, 1107 (8th Cir. 1995) (interpreting South Dakota law to hold police officers acted within scope of employment when they ordered a curfew-violating minor into the back seat of their car and raped her); *Latullas v. State*, 658 So. 2d 800, 801 (La. Ct. App. 1995) (holding correctional officer acted within scope of employment when he used authority as work crew supervisor to order female inmate to accompany him to trailer, where he raped her); *Mary M. v. City of Los Angeles*, 814 P.2d 1341, 1352 (Cal. 1991) (holding police officer acted within scope of employment where he used his authority to stop a female motorist, order her in his car, and rape her, threatening to jail her if she resisted); *see also Doe v. Forrest*, 853 A.2d 48, 61 (Vt. 2004) (holding that sheriff's department could be held vicariously liable for sexual abuse committed by police officer who "was able to separate the plaintiff from her companions because of the force and authority of [his] position").

These jurisdictions recognize, as did Congress in adopting the 1974 amendment, that the government should be held responsible for the acts of law enforcement officials taken under color of state or federal law. Unlike any other type of employee, public or private, a law enforcement officer has been given "intimidating authority" by the State. *Norris ex rel. West v. Waymire*, 114 F.3d 646, 649 (7th Cir. 1997); *see Doe v. City of Chicago*, 360 F.3d at 671 (noting that an officer "may seem to be above the law"). "Indispensable to law and order, he is also and inescapably a dangerous instrumentality. . . . [T]he

power of a rogue police officer to do harm is so great that more than ordinary care on the part of his employer may be required in order to provide adequate protection to the public." *Doe v. City of Chicago*, 360 F.3d at 671. Given these realities, a rule holding officer assault to be within the scope of employment is the logical "wave of the future." *Id.*

b. Other jurisdictions nonetheless have flatly rejected claims that a sexual assault committed by a law enforcement officer could ever be within the scope of employment. *See, e.g.*, *City of Sharonville v. American Employers Ins.*, 846 N.E.2d 833, 838 n.4 (Ohio 2006) ("Certainly, sexual assaults are not within the scope of employment of a law-enforcement officer, even when the assault could not have occurred 'but for' the perpetrator's authority as an officer of the law to detain the victim or to enter her home.") (citations omitted); *Frazier v. Badger*, 603 S.E.2d 587, 591 (S.C. 2004) ("[S]exual harassment by a government employee is not within the employee's 'scope of employment.'"); *see also Shantelle S. v. State*, No. 110268, 2006 WL 1141199, at *3 (N.Y. Ct. Cl. 2006) ("[S]exual assaults are not the kind of intentional torts that may render the employer liable under the doctrine because they are clearly perpetrated for the employee's own purposes."); *Doe v. White*, No. 00 C 0928, 2003 WL 256889, at *4 (N.D. Ill. 2003) ("Illinois courts have consistently found acts of sexual misconduct to be outside of the scope of employment as a matter of law.").

2. This division of authority is intolerable in the context of intentional tort liability under the FTCA. Though variances in state law ordinarily present no issue for this Court, a rule construing the FTCA so

that it incorporates those variances is a different matter. The FTCA is a *federal* statute, providing that the *federal* government may be held liable for the intentional torts of *federal* law enforcement officials. *Cf. Molzof v. United States*, 502 U.S. 301, 305 (1992) ("[T]he meaning of the term 'punitive damages' as used in [28 U.S.C.] § 2674 [of the FTCA], a federal statute, is by definition a federal question."). There is no reason that the scope of that liability should depend on the particular jurisdiction in which a federal officer commits an intentional tort. Such happenstance is particularly troubling in the case of federal prisoners, whom the government has "the power to transfer . . . to facilities in any one of several States[,] . . . thereby controlling to some extent the law that would apply to [its] own wrongdoing." *Carlson v. Green*, 446 U.S. 14, 25 n.11 (1980).

Indeed, the legislative history of the FTCA makes plain that "Congress had in mind no such patchwork plan for securing" redress against the government. *NLRB v. Hearst Publications*, 322 U.S. 111, 123 (1944) (interpreting the National Labor Relations Act); *see Feres*, 340 U.S. at 143 ("It would hardly be a rational plan of providing for [members of the military injured by military employees] to leave them dependent upon geographic considerations over which they have no control and to laws which fluctuate in existence and value."). Even if

> [s]uch a variegated pattern of culpability . . . ma[d]e sense in the context of negligent tort recovery, . . . its rationale in suits against law enforcement officials for intentional torts [would be] unjustified. The [1974] amendment seeks to establish a standard of appro-

> priate conduct for all federal officials who are charged with responsibility for ensuring constitutional rights. To make this demonstrably federal standard dependent upon state law turns the liability question on its head.

Boger, *et al.*, 54 N.C. L. Rev. at 521. As Justice Harlan explained in the context of *Bivens* suits, it is "entirely proper that [injuries inflicted by federal officials acting under color of law] be compensable according to uniform rules of federal law." *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 409 (1971) (Harlan, J., concurring).[8]

The justification for a uniform national standard is at least as compelling in the FTCA context. Only a uniform rule will allow federal law enforcement officers, who are often assigned to work in regions that include several states, effectively to avoid that conduct that will result in government liability, *see* Rosky, 36 U.C. Davis L. Rev. at 914, and ensure that

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[8] This Court has recently elaborated in other contexts the reasons why federal employment laws should implement uniform national standards of respondeat superior. *See, e.g., Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754-755 (1998) ("In express terms, Congress has directed federal courts to interpret Title VII based on agency principles. Given such an explicit instruction, we conclude a uniform and predictable standard must be established as a matter of federal law. We rely 'on the general common law of agency, rather than on the law of any particular State, to give meaning to these terms.'"); *see also Baker v. Texas & P. Ry. Co.*, 359 U.S. 227, 228 (1959) ("The Federal Employers' Liability Act does not use the terms 'employee' and 'employed' in any special sense, . . . so that the familiar general legal problems as to whose 'employee' or 'servant' a worker is at a given time present themselves as matters of federal law under the Act.").

federal courts fully effectuate the requirements and purposes of the FTCA.

The decision of the court of appeals, incorporating a view of state law under which the intentional torts of law enforcement officers can rarely, if ever, be deemed within the "scope of employment," exacerbates the conflict in authority on this point. The existence of that conflict is inconsistent with the FTCA and its 1974 amendment, which can be given effect only through a uniform national standard of liability. Accordingly, this Court should grant review and reverse the decision below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: October 15, 2007

APPENDIX

APPENDIX A

FILED
May 17, 2007
Charles R.
Fulbruge III,
Clerk

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 06-10654

MARILYN SHIRLEY and RAYMOND DOUGLAS SHIRLEY,

Plaintiff-Appellant,

VERSUS

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
For the Northern District of Texas
4:03-CV-1385

Before KING, DAVIS and BARKSDALE, Circuit Judges.

PER CURIAM:*

Appellant-Plaintiff Marilyn Shirley ("Shirley") appeals the district court's order granting summary judgment in favor of the Defendant-Appellee the United States of America on her claims brought under the Federal Tort Claims Act ("FTCA"). For the reasons that follow, we AFFIRM.

In January 1998, Plaintiff Marilyn Shirley ("Shirley") entered the federal prison at Federal Medical Center Carswell ("FMCC"), a relaxed supervision facility located in Fort Worth, Texas, to begin serving a 37-month sentence on a drug conviction. On March 11, 2000, Officer Michael Lawrence Miller, a correctional officer at FMCC, sexually assaulted Shirley.

In November 2003, after successfully pursuing a civil action against Miller, Shirley sued the United States under 28 U.S.C. § 1346(b) of the FTCA. She asserted claims under the theory of respondeat superior for intentional infliction of emotional distress, battery, assault, false imprisonment, negligence per se, and negligence. The government moved for summary judgment on all of Shirley's claims, arguing that the FTCA's waiver of sovereign immunity did not apply because Miller was not acting within the scope of his employment during the sexual assault. The district court agreed and

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*Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

granted the government's motion. Shirley lodges this appeal.

As the sovereign, the United States is immune from suit unless, and only to the extent that, it has consented to be sued.[1] Through the enactment of the FTCA, the government has generally waived its sovereign immunity from tort liability for the negligent or wrongful acts or omissions of its agents and employees who act within the scope of their employment "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."[2] Under Texas law, an employee acts within the scope of his employment if his actions are: (1) within the general authority given him; (2) in furtherance of the employer's business; and (3) for the accomplishment of the object for which the employee was employed.[3] The district court concluded that Miller's actions were not within the scope of employment because the sexual assault did not advance the United States's work, as required by prongs (2) and (3), and instead constituted a wholly personal action.[4]

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[1] FDIC v. Meyers, 510 U.S. 471, 475-76 (1994).

[2] 28 U.S.C. § 1346(b)(1); Garcia v. United States, 62 F.3d 126, 127 (5th Cir. 1995) (en banc).

[3] Ross v. Marshall, 426 F.3d 745, 763-64 (5th Cir. 2005) (citing numerous Texas cases).

[4] See Mackey v. U.P. Enters, Inc., 935 S.W.2d 446, 453 (Tex. App. 1996, no writ) (explaining that, under Texas law, where an employee turns away from the advancement of the employer's work to engage in wholly personal actions, he ceases to act for the employer, and the responsibility for those personal actions is upon him alone).

On appeal, Shirley argues that while the district court correctly articulated the general test for scope of employment in Texas, it failed to recognize and apply other Texas cases which have extended vicarious liability to an employer for an employee's actions despite a failure to fulfill all three prongs of the above test. Shirley specifically seeks to avoid prongs (2) and (3), which require some business purpose be attributable to the acts surrounding or leading to the wrongful conduct. However, the cases discussed by Shirley fail to support this argument because they involved instances where the employee's act was closely related to a legitimate employment goal or duty.[5] Shirley fails to allege that a similar legitimate employment interest animated Miller's sexual assault in the instant case.

We similarly reject Shirley's arguments based on foreseeability and apparent authority. None of the cases relied upon are sufficiently analogous nor do they serve to excuse a plaintiff in this context from making a showing that an employee's wrongful act grew out of a legitimate employment duty or goal.[6]

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[5] See Gulf, C. & S.F. Ry. Co. v. Cobb, 45 S.W.2d 323, 326 (Tex. App. 1931, writ dism'd w.o.j.) (employee's act would be imputed to the employer where the employee was acting to prevent his victim from interfering with the performance of the employee's assigned duties); Houston Transit Co. v. Felder, 208 S.W.2d 880, 882 (Tex. 1948) (evidence raised a jury issue as to the company's liability for an assault by its employee where employee testified that his purpose in approaching motorist was to secure information for his employer).

[6] Shirley relies on the following cases: Hooper v. Pitney Bowes, Inc., 895 S.W.2d 773, 777 (Tex. App. 1995, no writ) (explaining that the actions of an employee who is deemed to have acted within the scope of his employment are generally imputed to the employer but that an exception applies where

Finally, we reject Shirley's argument that the government's successful criminal prosecution of Miller for abuse of a ward serves to estop the government from arguing that Miller was acting outside the scope of his employment during the sexual assault. A conviction under 18 U.S.C. § 2243(b) does not establish scope of employment under Texas law.

AFFIRMED.

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the acts are unforeseeable); Borg-Warner Protective Services Corp. v. Flores, 955 S.W.2d 861 (Tex. App. 1997, no writ) (finding that supervisor's rape of a female subordinate would establish a constructive discharge).

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-10654

MARILYN ANN SHIRLEY; RAYMOND DOUGLAS SHIRLEY; ANGEL SHIRLEY; AARON SHIRLEY

Plaintiffs - Appellants

v.

UNITED STATES OF AMERICA

Defendant - Appellee

FILED
JUL 16 2007
Charles R. Fulbridge, III
CLERK

Appeal from the United States District Court for the Northern District of Texas, Fort Worth

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ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion 5/17/07, 5 Cir., _____, _____, F.3d _____)

Before KING, DAVIS and BARKSDALE, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (Fed. R. App. P. and 5th Cir. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (Fed. R. App. P. and 5th Cir. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ W. Eugene Davis
United States Circuit Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

MARILYN SHIRLEY	§	
and	§	
RAYMOND DOUGLAS	§	
SHIRLEY	§	
	§	CIVIL ACTION NO.
V.	§	4:03-CV-1385-Y
	§	
UNITED STATES OF	§	
AMERICA	§	

ORDER GRANTING MOTION
FOR SUMMARY JUDGMENT AND DENYING
MOTION FOR PARTIAL SUMMARY JUDGMENT

Pending before the Court is Defendant's motion for summary judgment [doc. # 48], filed August 2, 2005, and Plaintiffs' motion for partial summary judgment [doc. # 53], filed August 10, 2005. After consideration, the Court GRANTS Defendant's motion and DENIES Plaintiffs' motion.

I. BACKGROUND

The facts of this case are largely undisputed. In January 1998, Plaintiff Marilyn Shirley entered the federal prison at Federal Medical Center Carswell (FMC Carswell) to begin serving a 37-month sentence for her conviction for unlawful use of a communication device to facilitate the distribution of

a controlled substance. On March 11, 2000, Officer Michael Lawrence Miller, a correctional officer at FMC Carswell, sexually assaulted Shirley. Understandably fearful, Shirley hid the clothes she was wearing and did not immediately report the assault. When she was discharged from FMC Carswell on September 8, 2000, Shirley reported the assault to a correctional officer and to the camp administrator. To back up her claim, she provided the clothes she had been wearing at the time of the assault and had been hiding for six months. An investigation was opened, and Miller was assigned to other duties at another facility.

Shirley sued Miller in a *Bivens* action. [1] On June 3, 2003, a jury awarded Shirley $4,000,000 in damages. Miller was then indicted for aggravated sexual abuse, sexual abuse of a ward, abusive sexual contact, abusive sexual contact, and assault within special maritime and territorial jurisdiction of the United States. A jury convicted Miller on all five counts, and, on July 2, 2004, Miller was sentenced to 150 months' imprisonment. That same day, the district court dismissed the count for assault within special jurisdiction as a lesser-included offense. After his conviction, Miller was fired.

On November 26, 2003, Shirley and her husband, Raymond Douglas Shirley,[2] sued the United States

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[1] *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

[2] Plaintiffs were originally Shirley, her husband, and their two children. However, the third amended complaint only lists Shirley and her husband as plaintiffs.

under the Federal Tort Claims Act ("the FTCA"). *See* 28 U.S.C.A. §§ 1346(b), 2671-80 (West 1994 & Supp. 2005). She raises a claim for negligent hiring, training, supervision, and retention; under the theories of vicarious liability and respondeat superior, she alleges (1) intentional infliction of emotional distress, (2) battery, (3) assault, (4) false imprisonment, (5) negligence per se, and (6) negligence. The United States moves for summary judgment on all of Shirley's claims, and Shirley argues she is entitled to summary judgment on all claims except her claim for negligent hiring, training, supervision, and retention.

II. SUMMARY-JUDGMENT STANDARD

Summary judgment is appropriate when the record establishes "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment has the initial burden of demonstrating that it is entitled to a summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The moving party need not produce evidence showing the absence of a genuine issue of material fact with respect to an issue on which the nonmovant bears the burden of proof. Rather, in that situation, the moving party need only point out that the evidentiary documents in the record contain insufficient proof concerning an essential element of the nonmovant's claim. *Id.* at 323-35. Where, however, the moving party bears the burden of proof on the claim upon which it seeks summary judgment, it must present evidence that establishes "beyond peradventure *all* the essential

elements of the claim or defense." *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986).

When the moving party has carried its summary judgment burden, the nonmovant must go beyond the pleadings and by its own affidavits or by the depositions, answers to interrogatories, or admissions on file set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). This burden is not satisfied with some metaphysical doubt as to the material facts, by conclusory allegations, by unsubstantiated assertions, or by only a scintilla of evidence. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994). If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986).

In making its determination on the motion, the Court must look at the full record in the case. *See* Fed. R. Civ. P. 56(c); *Williams v. Adams*, 836 F.2d 958, 961 (5th Cir. 1988). Nevertheless, Rule 56 "does not impose on the district court a duty to sift through the record in search of evidence to support a party's opposition to summary judgment." *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 915-16 & n.7 (5th Cir.), *cert. denied*, 506 U.S. 825 (1992). Instead, parties should "identify specific evidence in the record, and...articulate the 'precise manner' in which that evidence support[s] their claim." *Forsyth v. Barr*, 19 F.3d 1527, 1537 (5th Cir. 1994).

III. DISCUSSION

A. NEGLIGENT HIRING, TRAINING, SUPERVISION, AND RETENTION

Shirley asserts that the United States was negligent in training its officers with regard to the implementation of policies and procedures relating to the prevention of sexual violence and advances, the identification of individuals involved in instigating sexua l violence and advances, and the reporting of such sexual violence and advances when it came to their knowledge. She further argues that the United States was negligent in implementing these policies and procedures and in supervising its officers regarding the policies and procedures. (3d Am. Comp. at 6-7.)

As the sovereign, the United States is immune from suit unless, and only to the extent that, it has consented to be sued. *FDIC v. Meyer*, 510 U.S. 471, 475-76 (1994). Through the enactment of the FTCA, the government has generally waived its sovereign immunity from tort liability for the negligent or wrongful acts or omissions of its agents who act within the scope of their employment "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C.A. § 1346(b)(1) (Supp. 2005); *see also Truman v. United States*, 26 F.3d 592, 594 (5th Cir. 1994). However, immunity applies if the negligence claim is based on the federal employee's "exercise or performance or the failure to exercise or perform a discretionary function or duty." 28 U.S.C.A. § 2680(a) (1994). If a government action or decision falls within the discretionary exception, this Court lacks subject-matter jurisdiction over the matter. *See ALX El Dorado, Inc. v. Sw. Sav. & Loan Ass'n/FSLIC*, 36 F.3d 409, 410 n.5 (5th Cir. 1994). But if a federal statute, regulation, or policy

specifically prescribes a course of action for an employee to follow, the act is nondiscretionary, and immunity does not apply. *See United States v. Gaubert*, 499 U.S. 315, 322 (1991). The FTCA exceptions to immunity must be strictly construed in favor of the United States. *See Truman*, 26 F.3d at 594.

To determine whether the discretionary-function exception applies, a two-part test applies. First, the government acts must be discretionary, i.e., the acts must involve "an element of judgment or choice" in order to be protected by the exception. *Id.* Second, even if the governmental acts are found to involve judgment or choice, such action must be of the kind that the exception was designed to shield. *See id.* at 322-23. Thus, the exception protects only government action that is based on public-policy considerations. *See id.*

Courts have repeatedly held that employment decisions, i.e., the manner in which the United States selects, trains, and supervises its employees, are discretionary functions. *See, e.g., Nurse v. United States*, 226 F.3d 996, 1001-02 (9th Cir. 2000); *Burkhart v. Wash. Metro. Area Transit Auth.*, 112 F.3d 1207, 1217 (D.C. Cir. 1997); *Tonelli v. United States*, 60 F.3d 492, 496 (8th Cir. 1995); *Richman v. Straley*, 48 F.3d 1139, 1146-47 (10th Cir. 1995); *Attallah v. United States*, 955 F.2d 776, 784-85 (1st Cir. 1992); *Dretar v. Smith*, 752 F.2d 1015, 1017 n.2 (5th Cir. 1985). This case is no different. Shirley points to regulations and statutes that provide that the Bureau of Prisons has a duty to provide a safe environment and protect its inmates. (Shirley Resp. at 15-16.) However, these statutes and regulations

do not limit or deny the existence of discretion for implementing that specific policy. Imposing a duty with no specific designation of how to carry out such authority is the essence of discretion. Thus, because the United States' employment decisions are discretionary functions, the United States is immune from this claim.

B. CLAIMS RAISED UNDER VICARIOUS LIABILITY/RESPONDEAT SUPERIOR

Shirley asserts that the United States is liable for the actions of Miller under the doctrines of respondeat superior and vicarious liability and raises the following claims: intentional infliction of emotional distress, battery, assault, false imprisonment, negligence per se, and negligence. Both Shirley and the United States argue that they are entitled to judgment as a matter of law on these claims.

As stated above, the waiver of sovereign immunity in the FTCA only covers torts committed by government employees acting within the scope of their employment. *See Sheridan v. United States*, 487 U.S. 392, 400-01 (1988). The issue of scope of employment is determined under state law. *See* 28 U.S.C.A. § 1346(b); *Garcia v. United States*, 62 F.3d 126, 127 (5th Cir. 1995). In Texas, an employee acts within the scope of his employment if his actions are (1) within the general authority given him, (2) in furtherance of the employer's business, and (3) for the accomplishment of the object for which the employee was employed. *See Williams v. United States*, 71 F.3d 502, 506 (5th Cir. 1995); *Green v. Ransor, Inc.*, 175 S.W.3d 513, 516 (Tex. App. 2005, no pet.); *Mackey v. U.P. Enters., Inc.*, 935 S.W.2d 446,

453 (Tex. App. 1996, no writ); *Drooker v. Saeilo Motors*, 756 S.W.2d 394, 397 (Tex. App. 1988, writ denied). When an employee turns away from the advancement of the employer's work to engage in wholly personal actions, he ceases to act for the employer, and the responsibility for those personal actions is upon him alone. *Mackey*, 935 S.W2d at 453. It is clear here that Miller's actions were not work-related. In sexually assaulting Shirley, Miller stepped aside from his employment to accomplish his own, rather than the United States', purpose. *See, e.g., City of Green Cove Springs v. Donaldson*, 348 F.2d 197, 203 (5th Cir. 1965); *Mackey*, 935 S.W.2d at 453-54. *See generally* Rochelle Rubin Weber, Note, *"Scope of Employment" Redefined: Holding Employers Vicariously Liable for Sexual Assaults Committed by Their Employees*, 76 Minn. L. Rev. 1513, 1521-22 & nn.33-34 (1992) (collecting cases holding sexual assault falls outside scope of employment).

IV. CONCLUSION

While Miller's actions are abhorrent, the immunity granted to the United States cannot be surmounted in this case. Thus, the United States is entitled to judgment as a matter of law.

SIGNED March 21, 2006.

/s/ Terry R. Means
TERRY R. MEANS
UNITED STATES
DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

MARILYN SHIRLEY	§	
and	§	
RAYMOND DOUGLAS	§	
SHIRLEY	§	
	§	CIVIL ACTION NO.
V.	§	4:30-CV-1385-Y
	§	
UNITED STATES OF	§	
AMERICA	§	

FINAL JUDGMENT

Pursuant to the order issued this same day and Federal Rule of Civil Procedure 58,

It is hereby ORDERED, ADJUDGED, and DECREED that Defendant is entitled to judgment as a matter of law and that Plaintiffs take nothing on their claims. It is further ORDERED, ADJUDGED, and DECREED that such claims be and are hereby DISMISSED WITH PREJUDICE. All costs under 28 U.S.C. § 1920 shall be taxed against Plaintiffs.

SIGNED March 21, 2006.

/s/ Terry R. Means
TERRY R. MEANS
UNITED STATES
DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS FORT WORTH DIVISION

MARILYN SHIRLEY, RAYMOND DOUGLAS SHIRLEY	§	
	§	**CAUSE NO.**
vs.	§	**4:03-CV-1385-Y**
	§	
UNITED STATES OF AMERICA	§	

ORDER DENYING MOTION FOR RECONSIDERATION

Pending before the Court is Plaintiffs' motion for reconsideration [doc. # 82], filed April 4, 2006. After consideration, the Court DENIES the motion. Plaintiffs ask this Court to alter or amend the March 21 judgment granting Defendant's motion for summary judgment. *See* Fed. R. Civ P. 59(e). Absent highly unusual circumstances, reconsideration under Rule 59(e) is appropriate only where: (1) the Court committed clear error or the initial decision was manifestly unjust, (2) the Court is presented with newly discovered evidence, or (3) there is an intervening change in controlling law. *See Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 863-64 (5th Cir. 2003); *Sch. Dist. No. 1J, Multnomah County, Or. v. AC&S, Inc.*, 5 F.3d 1255, 1262 (9th

Cir. 1993). Plaintiffs have failed to meet this high threshold.

Signed May 9, 2006.

/s/ Terry R. Means
TERRY R. MEANS
UNITED STATES
DISTRICT JUDGE

APPENDIX F

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Federal Tort Claims Act are codified at 28 U.S.C. §§ 1346(b)(1), 2680(a) and 2680(h) as follows:

§ 1346. United States as defendant

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

§ 2680. Exceptions

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty

on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided,* That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso [enacted March 16, 1974], out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.